

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:10-CR-365 JCM (PAL)

Plaintiff(s),

ORDER

V.

BRAD FUSSELL

Defendant(s).

Presently before the court is *pro se* defendant Brad Fussell’s motion to reopen time for appeal under Federal Rule of Appellate Procedure (“Rule”) 4(a)(6). (Doc. # 216). The government has not filed a response.

I. Background

On July 6, 2015, this court entered an order denying defendant Fussell’s motion to vacate, set aside, or correct his sentence. (Doc. ## 195, 211). Defendant filed a notice of appeal on November 2, 2015, 119 days after this court entered its order. (Doc. # 216). Under Federal Rule of Appellate Procedure (“FRAP”) 4(a)(1)(B), defendant’s notice of appeal was due within 60 days of the court’s order. FED. R. APP. P. 4(a)(1)(B). Accordingly, defendant did not file a timely notice of appeal.

Defendant included with his notice of appeal, however, an additional notice indicating that, as of that date, he had not been served with a copy of the court's July 6, 2015, order. (*See* doc. # 215). Fussell states that, as of October 15, 2015, he had received no records from the court with respect to the July order. (*Id.*). Fussell acknowledges that on October 20, 2015, he received a copy

1 of the court's docket in response to his October 15, 2015, request for records, but indicates that as
 2 of the filing of both notices, he had still not received a copy of the order itself. (*Id.*).

3 On November 12, 2015, the United States Court of Appeals for the Ninth Circuit ("appeal
 4 court") issued an order remanding the appeal to this court. The appeal court found that this court
 5 should have collectively construed Mr. Fussell's two notices as a single motion to reopen the time
 6 for appeal under Rule 4(a)(6). *See United States v. Withers*, 638 F.3d 1055, 1061 (9th Cir. 2011)
 7 (district court should construe notice of appeal as motion for relief under Rule 4(a)(6) when it
 8 includes allegations of non-receipt of the judgment). Accordingly, the appeal court remanded the
 9 appeal to this court "for the limited purpose of allowing [the] court to rule on appellant's November
 10 2, 2015, motion to reopen time for appeal."

13 **II. Legal Standard**

14 Under FRAP 4(a)(6), a district court may reopen the time for filing an appeal for a period
 15 of 14 days if (a) the court finds that the moving party did not receive notice of the entry under
 16 Federal Rule of Civil Procedure ("FRCP") 77(d) within 21 days of entry; (b) the motion is filed
 17 within 180 days of the entry or within 14 days after the moving party does receive 77(d) notice,
 18 whichever is earlier; and (c) the court finds that no party would be prejudiced. FED. R. APP. P.
 19 4(a)(6).

21 The rule gives a district judge discretion in deciding the motion, but that discretion is
 22 limited. *See Withers* at 1061–62. Where the moving party's assertion that it did not receive notice
 23 is unchallenged, and the other FRAP 4(a)(6) conditions are satisfied, denial of the motion is an
 24 abuse of the district court's discretion. *See id.* (citing *Nunley v. City of Los Angeles*, 52 F.3d 792,
 25 797 (9th Cir. 1995)).

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1 **III. Discussion**

2 The court finds that Mr. Fussell's assertion is unchallenged. The government has not filed
3 any papers in opposition to Mr. Fussell's motion. Moreover, shortly before the court entered the
4 order in question, Mr. Fussell filed a notice of lack of service. (Doc. # 207). In response to that
5 notice, on May 21, 2015, the government indicated that it may have made an inadvertent clerical
6 error with respect to delivery of documents to Mr. Fussell, who is currently incarcerated. (Doc. #
7 208). Government's counsel represented that she would mail copies of all relevant documents, at
8 that point in time, to defendant. (*Id.*). Nevertheless, defendant claims he is still suffering from lack
9 of delivery.

10 Reviewing the court's electronic filing docket, the court finds that the clerk of the court has
11 recorded an incorrect address for defendant Fussell. While defendant's correspondence indicates
12 an address of "FPC Florence - P.O. Box 5000," the court's electronic filing system lists an address
13 of "FPC Florence - P.O. Box 6000" for defendant Fussell. Both addresses state the correct ZIP
14 code of 81226 in Florence, CO.

15 Given the history of non-delivery of documents to this defendant and the discrepancy
16 between the defendant's actual address and that recorded in the court's electronic filing system, the
17 court finds that Mr. Fussell did not receive notice under FRCP 77(d) until October 20, 2015. *See*
18 FED. R. APP. P. 4(a)(6)(A). Next, defendant's notices of appeal and lack of delivery were filed on
19 November 2, 2015, within 14 days of defendant's FRCP 77(d) notice. *See* FED. R. APP. P.
20 4(a)(6)(B). Finally, the court finds that the parties in the case are not prejudiced. *See* FED. R. APP.
21 P. 4(a)(6)(C).

22 Therefore, the defendant has demonstrated that the conditions set forth in FRAP
23 4(a)(6)(A)–(C) have been satisfied. Because defendant's assertion that he did not receive notice is
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1 unchallenged, and the other conditions of FRAP 4(a)(6) have been satisfied, the court must grant
2 defendant's motion. *See Withers* at 1061–62.

3 **IV. Conclusion**

4 Accordingly,

5 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Brad Fussell's
6 motion to reopen time for appeal (doc. # 216) be, and the same hereby is, GRANTED.

7 IT IS FURTHER ORDERED that defendant Brad Fussell shall have 14 days from the date
8 of this order to file a notice of appeal from this court's July 6, 2015, order. (Doc. # 211).

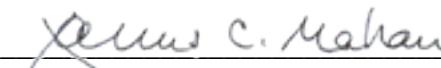
9 IT IS FURTHER ORDERED that the clerk of the court shall modify defendant Brad
10 Fussell's mailing address in the court's electronic filing system to the following:

11 Brad Fussell
12 Reg. # 45184-048
13 FPC Florence
14 P.O. Box 5000
15 Florence, CO 81226

16 IT IS FURTHER ORDERED that the clerk of the court shall mail copies of this order and
17 the court's July 6, 2015, order (doc. # 211) to defendant Brad Fussell at the above address.

18 IT IS FURTHER ORDERED that the clerk of the court shall serve a copy of this order on
19 the United States Court of Appeals for the Ninth Circuit, in case number 15-17195.

20 DATED November 19, 2015.

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24 UNITED STATES DISTRICT JUDGE